Supreme Court, U.S.
FILED
DEC 30 1999
CLERK

No. 99- 905

IN THE

Supreme Court of the United States

ARMSTRONG SURGICAL CENTER, INC.,

Petitioner,

v.

ARMSTRONG COUNTY MEMORIAL HOSPITAL; ROGELIO BORJA; RICHARD BOSCO; ZAFAR CHOWDHRY; JEFFREY DAVID; FRANK DAVIE; EGBERT DEVRIES; PAUL L. FREDERICK; JOHN GARROTT; FRANK N. GENOVESE; IRVING KLEIN; DAVID H. KOHL; LEE H. KOSTER; JOHN MARTY; MICHAEL P. ONDICH; KARL R. SALTRICK; WILLIS SHOOK; ANTHONY SMALDINO; PETER SOTOS; JAE T. YANG,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

MICHAEL J. MANZO
Counsel of Record
KLETT, LIEBER, ROONEY
& SCHORLING, P.C.
Attorneys for Respondent Armstrong County Memorial Hospital
One Oxford Centre
301 Grant Street, 40th Floor
Pittsburgh, PA 15219
(412) 392-2018

WENDELYNNE J. NEWTON
Counsel of Record
SHEILA SMITH DiNARDO
BUCHANAN INGERSOLL
PROFESSIONAL CORPORATION
Attorneys for Respondent Physicians
One Oxford Centre
301 Grant Street, 20th Floor
Pittsburgh, PA 15219
(412) 562-8932

157019

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

I. Is opposition in a State administrative proceeding entitled to *Noerr-Pennington* immunity as a matter of law, where the State proceeding was legitimate and any alleged misrepresentation was raised in the State proceeding?

II. Where the damages alleged are caused solely by State action, does the fact that protected *Noerr-Pennington* petitioning activity played a role in the State process create antitrust liability?

III. Does the decision of the Court of Appeals for the Third Circuit conflict with this Court's precedents or with the applicable legal standard recognized by other Courts of Appeals, and warrant the grant of certiorari?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Statement of the Case	1
Summary of Argument	4
Reasons for Denying the Writ	5
I. Opposition In A State Administrative Proceeding Is Entitled To *Noerr-Pennington* Immunity As A Matter Of Law, Where The State Proceeding Was Legitimate, And Any Alleged Misrepresentation Was Raised In The State Proceeding.	5
II. Where The Damages Alleged Are Caused Solely By State Action, The Fact That Protected *Noerr-Pennington* Petitioning Activity Played A Role In The State Process Does Not Create Antitrust Liability.	11
III. The Decision Of The Third Circuit Does Not Conflict With This Court's Precedent Or The Applicable Legal Standard Recognized By Other Courts Of Appeals, And Does Not Warrant The Grant Of Certiorari.	15
Conclusion	21
Appendix — Complaint Dated July 23, 1996	1

TABLE OF CITED AUTHORITIES

Page

Cases:

Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988) 11, 15

Boulware v. Nevada, Dept. of Human Resources, 960 F.2d 793 (9th Cir. 1992) 5

California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972), ... 15, 16, 17, 18

California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) 11

Cheminor Drugs, Ltd. v. Ethyl Corp., 168 F.3d 119 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 173 (1999) 17, 18

City of Columbia v. Omni Outdoor Adver. Inc., 499 U.S. 365 (1991) 15, 18, 19

Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240 (9th Cir. 1982) 17

Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) ..... *passim*

F.T.C. v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990) 9, 10, 11, 15

Cited Authorities

Page

F.T.C. v. Ticor Title Ins. Co., 504 U.S. 621 (1992) 11

Garst v. Stoco, Inc., 604 F. Supp. 326 (E.D. Ark. 1985) 6

General Hosps. of Humana, Inc. v. Baptist Med. Sys., Inc., No. LR-C-84-455, 1986 WL 935 (E.D. Ark. Feb. 12, 1986) 6

Hospital Bldg. Co. v. Trustees of Rex Hosp., 791 F.2d 288 (4th Cir. 1986) 5

Israel v. Baxter Lab., Inc., 466 F.2d 272 (D.C. Cir. 1972) 17

Juster Assoc. v. City of Rutland, 901 F.2d 266 (2d Cir. 1990) 15

Kottle v. Northwest Kidney Ctrs., 146 F.3d 1056 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 1031 (1999) 15, 19, 20

Lake Otis Clinic, Inc. v. Sisters of Providence, 921 F.2d 280 (9th Cir. 1990) 5

Lawline v. American Bar Ass'n, 956 F.2d 1378 (7th Cir. 1992) 15

Cited Authorities

Page

Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n, 107 F.3d 1026 (3d Cir. 1997), *cert. denied*, 522 U.S. 907 (1997) 14, 15

McGuire Oil Co. v. Mapco, Inc., 958 F.2d 1552 (11th Cir. 1992) 19, 20

North Carolina ex rel. Edminston v. P.I.A. Asheville, Inc., 740 F.2d 274 (4th Cir. 1984), *cert. denied*, 471 U.S. 1003 (1984) 11

Overlook Medical Clinic v. Department of Health, 560 A.2d 268, 270 (Pa. Commw. Ct. 1989), *on reconsideration*, 565 A.2d 834 (Pa. Commw. Ct. 1989) 14

Parker v. Brown, 317 U.S. 341 (1943) 11, 12

Patrick v. Burget, 486 U.S. 94 (1988) 11

Potters Med. Ctr. v. City Hosp. Ass'n., 800 F.2d 568 (6th Cir. 1986) 5, 15, 19

Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49 (1993) . 15, 17, 18, 19

Sandy River Nursing Care v. Aetna Cas., 985 F.2d 1138 (1st Cir. 1993), *cert. denied*, 510 U.S. 818 (1993) 15

Cited Authorities

Page

St. Joseph's Hosp., Inc. v. Hospital Corp. of Am., 795 F.2d 948 (11th Cir. 1986) 15, 19

United Mine Workers v. Pennington, 381 U.S. 657 (1965) ..... *passim*

Whelan v. Abell, 48 F.3d 1247 (D.C. Cir. 1995) ... 17

Statutes:

28 Pa. Bull. No. 23 (June 6, 1998) 12

28 Pa. Code § 401.4 1

37 Pa. Code §§ 197.1, *et seq.* 14

35 Pa. Stat. Ann. §§ 448.101 *et seq.* 1

35 Pa. Stat. Ann. § 448.103 13

35 Pa. Stat. Ann. § 448.201(14) 1

35 Pa. Stat. Ann. § 448.202 13

35 Pa. Stat. Ann. § 448.502 13

35 Pa. Stat. Ann. § 448.505 13

35 Pa. Stat. Ann. § 448.506 13

Cited Authorities

	Page
35 Pa. Stat. Ann. § 448.603	13
35 Pa. Stat. Ann. §§ 448.701, *et seq.*	14
35 Pa. Stat. Ann. §§ 448.704(b)	14
35 Pa. Stat. Ann. § 448.707	12, 13
35 Pa. Stat. Ann. § 448.904a	1
71 Pa. Stat. Ann. § 532(a)	1
71 Pa. Stat. Ann. § 532(g)	1
United States Constitution:	
U.S. Const. amend. I	4, 9
Rules:	
Fed. R. Civ. P. 12(b)(6)	14

STATEMENT OF THE CASE

In 1990, a group of investors, including counsel of record for Petitioner, decided to build an outpatient ambulatory surgical center in Armstrong County, Pennsylvania — Armstrong Surgical Center, Inc. On March 11, 1991, Petitioner filed an application with the Pennsylvania Department of Health, seeking a Certificate of Need ("CON") to permit such a center under the Pennsylvania Health Care Facilities Act, 35 Pa. Stat. Ann. §§ 448.101 *et seq.*[1] (App. 3a, 52a, 88a, 102a-103a; Compl. ¶8).[2] Over the next two years, as acknowledged by Petitioner in its Complaint, "the Department engaged in an extensive review process which included gathering information by investigation, submissions and at a public hearing held on October 7, 1993." (App. 17a-18a, 52a, 102a; Compl. ¶10). On November 17, 1993, the Pennsylvania Department of Health Planner recommended disapproval of Petitioner's CON application. (App. 4a, 17a-18a, 53a, 88a, 102a, 104a; Compl. ¶15). On

1. The criteria and standards applicable to the Department's review of a Certificate of Need application were issued pursuant to the Health Care Facilities Act, 35 Pa. Stat. Ann. § 448.201(14), and The Administrative Code of 1929, 71 Pa. Stat. Ann. §§ 532(a), (g), and were set forth at Section 401.4 of the Department's regulations, 28 Pa. Code § 401.4. Petitioner did not plead (and could not plead) that the Department failed to apply these criteria and standards. Pennsylvania's CON Act sunset on December 18, 1996. *See* 35 Pa. Stat. Ann. § 448.904a. The fact of the sunset does not affect the issues on review.

2. References to "App. __a" are to the Appendix submitted with the Petition for a Writ of Certiorari. References to "Compl." are to the Complaint filed by Petitioner in the United States District Court for the Western District of Pennsylvania, reproduced as an appendix to this brief.

November 29, 1993, the Pennsylvania Department of Health denied the CON requested by Petitioner. (App. 4a, 17a-18a, 53a, 88a, 102a, 104a; Compl. ¶15). Petitioner appealed to the Commonwealth of Pennsylvania State Health Facility Hearing Board ("State Board"), which, after additional evidence and a hearing, affirmed the Department of Health's denial of the CON. (App. 4a-5a, 18a, 53a, 65a-67a, 90a, 102a-103a, 109a, 117a; Compl. ¶16). Petitioner appealed the State Board's ruling to the Commonwealth Court of Pennsylvania. (App. 5a, 18a, 67a, 87a, 100a, 104a). The Commonwealth Court affirmed the State Board's decision and found it to be based upon substantial evidence. (App. 5a, 18a, 67a, 87a, 100a, 104a).

Armstrong County Memorial Hospital ("Hospital"), the only health care facility with operating rooms in Armstrong County, and 19 individual physician respondents ("Physician Respondents") who performed inpatient and outpatient surgery at the Hospital before, during and after the State CON determination and appeal process, opposed Petitioner's CON application in the State proceeding.[3] (App. 2a-4a, 52a, 90a, 102a, 105a-106a; Compl. ¶¶4, 12, 19, 21-22). The Hospital submitted evidence to the Department and the State Board in opposition to Petitioner's CON application. (App. 52a, 92a, 102a-104a, 108a). The 19 Physician Respondents each signed a letter opposing Petitioner's CON. (App. 4a, 52a, 54a, 107a-108a; Compl. ¶36). Any information or testimony submitted by the Hospital during the course of the Department's extensive review process constituted only a portion of the material the Department and the State Board

3. In the interests of judicial economy, the Respondent Hospital and the 19 Respondent Physicians submit this Brief in Opposition jointly.

considered before rejecting Petitioner's CON application. (App. 18a-19a, 90a-98a, 103a-109a).

It is undisputed that at the time of the Department of Health hearing on the application, the Hospital had 6 mixed-use operating rooms ("ORs") and a small room used for "short procedures." (App. 4a, 18a n.6, 52a, 90a, 105a-106a, 112a; Compl. ¶13). Petitioner's sole allegation of any misrepresentation concerns the status of a partially completed outpatient surgery center to which existing outpatient surgery at the Hospital would be transferred. (App. 4a, 53a, 91a, 106a, 112a-113a; Compl ¶¶19, 34-37). It is undisputed that outpatient surgery was being performed in the Hospital's 6 mixed-use ORs throughout the CON process. (App. 4a, 52a-53a, 90a, 112a-113a; Compl. ¶¶4, 19, 22). It is also undisputed that the Hospital's outpatient surgery center would not have increased the total number of operating rooms in Armstrong County. (App. 5a, 53a, 113a; Compl. ¶13).

As part of the CON proceeding, the Department of Health projected the number of operating rooms needed in Armstrong County as 6.5, and determined that Petitioner's proposed center would add two more operating rooms — or 1.5 more than the State determined to be necessary. (App. 18a n.6, 90a, 105a, 110a; Compl. ¶8). The Department's decision to deny Petitioner's CON application, and the Board's subsequent affirmance, were each based on a determination that Petitioner's proposed center would duplicate *existing* facilities. (App. 5a, 18a, 65a, 91a, 106a, 111a, 113a). Further, the cessation of construction by the Hospital on its outpatient surgery center was raised in the adjudicatory proceedings, and was known by the Department, the State Board and the Commonwealth Court. (App. 5a, 18a, 93a-98a, 106a, 112a-113a n.9). Considering all of the

evidence, the Department and the State Board both found that Petitioner had failed to meet its burden of demonstrating need, and the Commonwealth Court found those determinations to be based upon substantial evidence. (App. 5a, 18a, 93a-98a, 106a, 112a-113a n.9). Similarly, the Department, State Board and Commonwealth Court all were aware of Respondents' alleged self-interest. (App. 18a, 55a).

After the State denied Petitioner's application for a CON to construct a new outpatient surgery center in Armstrong County, Petitioner sued the Hospital and the Physician Respondents for damages resulting from the State's decision. (App. 11a-12a, 58a, 87a; Compl. ¶¶56-60). As the Third Circuit correctly recognized, all of Petitioner's alleged injuries were caused solely by the denial of the CON. (App. 11a-12a, 58a, 87a; Compl ¶ 56-60).

SUMMARY OF ARGUMENT

The Third Circuit correctly stated and applied the *Noerr-Pennington* doctrine. Respondents' opposition to Petitioner's CON application in a State administrative proceeding is precisely the sort of First Amendment petitioning activity that is immunized from antitrust liability. The State proceeding was legitimate, and the alleged misrepresentation, which Petitioner contends now subjects Respondents to antitrust liability, was raised in the State proceeding. Further, the Third Circuit was correct in holding that any damage to Petitioner was caused by the State's denial of a CON to Petitioner. The Third Circuit correctly applied *Noerr-Pennington* and the doctrine of proximate cause, and its decision in this case is consistent with this Court's precedents, and with the applicable legal standard recognized

by other Courts of Appeals. Contrary to Petitioner's assertions, there is no conflict that warrants the grant of certiorari.

REASONS FOR DENYING THE WRIT

I. OPPOSITION IN A STATE ADMINISTRATIVE PROCEEDING IS ENTITLED TO *NOERR-PENNINGTON* IMMUNITY AS A MATTER OF LAW, WHERE THE STATE PROCEEDING WAS LEGITIMATE, AND ANY ALLEGED MISREPRESENTATION WAS RAISED IN THE STATE PROCEEDING.

Courts uniformly have held that expressing opposition to a CON application in an administrative proceeding is precisely the type of conduct that is immune under *Noerr-Pennington*. *See, e.g.*, *Boulware v. Nevada, Dept. of Human Resources*, 960 F.2d 793 (9th Cir. 1992) (hospital corporation with monopoly over MRI services that acted to protect its monopoly by aiding state agency and bringing suit to enjoin competitor from operating without CON protected by *Noerr-Pennington*); *Lake Otis Clinic, Inc. v. Sisters of Providence*, 921 F.2d 280 (9th Cir. 1990) (table), No. 90-35064, 1990 WL 212644 (9th Cir. Dec. 18, 1990) (text) (hospital's conduct in administrative proceedings resulting in revocation of competitor's CON protected under *Noerr-Pennington*); *Potters Med. Ctr. v. City Hosp. Ass'n*, 800 F.2d 568 (6th Cir. 1986) (conduct of hospital and physician in challenging competitor's acquisition of equipment and commencement of building program without CON and in opposing competitor's state administrative reimbursement application was protected under *Noerr-Pennington*); *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 791 F.2d 288 (4th Cir. 1986)

(*Noerr-Pennington* protects hospital trustees' conduct in opposing CON application filed by competing hospital seeking to relocate and expand); *General Hosps. of Humana, Inc. v. Baptist Med. Sys., Inc.*, No. LR-C-84-455, 1986 WL 935 (E.D. Ark. Feb. 12, 1986) (actions of hospitals in opposing a hospital corporation's CON application to build a competing hospital were immune under *Noerr-Pennington*); *Garst v. Stoco, Inc.*, 604 F. Supp. 326 (E.D. Ark. 1985) (conduct of hospital and its employees in opposing physician's CON application before state agency was immune under *Noerr-Pennington*).

In an obvious attempt to sidestep the clear mandate of *Noerr-Pennington*, Petitioner alleged that Respondents misrepresented the existence of outpatient surgery at the Hospital. (App. 4a, 12a, 79a, 80a; Compl. ¶¶34-37). More particularly, Petitioner's sole allegation of any misrepresentation concerned the status of a partially completed Hospital outpatient surgery center. (App. 106a; Compl. ¶36). Yet as admitted by Petitioner, outpatient surgery was already being performed at the Hospital. (App. 53a, 105a-106a; Compl. ¶¶4, 19, 22). Petitioner itself pled that outpatient surgical services in Armstrong County were supplied by the Hospital and the Physician Respondents. (App. 2a-3a, 52a, 90a, 105a-106a; Compl. ¶22). The State Board was well aware of the fact that all of the Hospital's outpatient surgery was being performed in the same operating rooms as its inpatient surgery, that the Hospital had only partially completed construction of a freestanding outpatient surgery facility, that construction of that facility had ceased and that the building was being used as a storage facility. (App. 105a-106a, 113a n.9).

As the District Court recognized, "[Petitioner's] contention that [Respondents] told lies in the State adjudicatory process which substantially affected the validity of the State process legally is unsupported." (App. 82a). As the District Court explained:

> The decisions of the state officials at each step of the process are reflected in public documents which speak for themselves. The Board was well aware of the circumstances surrounding the Hospital's "phantom" ASC and that construction had ceased on the building. Pursuant to its independent fact-finding authority it determined that "[a]lthough the building is currently being used as a storage facility, there was credible evidence that the project has not been abandoned." *In re Armstrong Surgical Center, Inc.*, S.H.F.H.B., CN93-029, Feb. 13, 1996 at 14 n.9. It also was well aware of defendants' asserted self-interest with regard to the assertions advanced during the review process. *Id.* at 17.

(App. 82a).

Further, Petitioner admitted in its Complaint that "the proposed Hospital ASC [ambulatory surgery center] would not increase the total number of ORs in Armstrong County." (Compl. ¶19) As the Third Circuit correctly noted, based on these undisputed facts:

> The Board's "need projection formula" projected a need for 6.5 operating rooms. The Hospital currently had six general purpose operating rooms and a room used for "short procedures" such as

> endoscopies, colonscopies and sigmoidoscopies. If and when the Hospital's proposed facility was completed, three of the general purpose operating rooms would be closed and the ambulatory Surgical services provided in the main building would be provided in the new facility. The Surgical Center proposed to add two operating rooms under circumstances where the State Health Plan's need-project formula indicated, at most, need for one additional (seventh) operating room. In terms of the population to be served and the surgical services to be rendered, the Surgical Center's project would do little other than raise the number of operating rooms in Armstrong County above the limit set by the State Health Plan. The Board, therefore, concluded that approval of the instant CON application would result in needless duplication of *existing facilities* and health care services. While the Surgical Center projected a higher need and suggested that its facility would serve a larger area than the hospital, the Board found its projections flawed. The opinion of the Commonwealth Court establishes that it also understood this to be the basis for the Board's ruling, a basis for which it found support in the record.

(App. 18a n.6). Moreover, the Department and the State Board found that Petitioner's statistical evidence submitted to support its volume projections for outpatient services "did not support [Petitioner's] projected growth rate in the demand for such services." (App. 65a).

Based on the findings in the State administrative process on outpatient surgery, existing facilities and projected need,

as well as the express consideration of Petitioner's allegation of a misrepresentation with respect to a Hospital outpatient surgery center — all of which was reviewed by the Commonwealth Court of Pennsylvania — *Noerr-Pennington* immunity applies as a matter of law.[4]

Further, *Noerr-Pennington* immunity is not eliminated where the exercise of the First Amendment right to voice opposition in a State administrative proceeding involves more than one person or entity. If it were, the protection would be substantially gutted. As this Court explained in *F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990), the critical distinction between *Noerr-Pennington* protected activity and unprotected activity is the familiar end-means distinction:

> But in the *Noerr* case the alleged restraint of trade was the intended consequence of public action; in this case [*Trial Lawyers*] the boycott was the means by which respondents sought to obtain favorable legislation. The restraint of trade that was implemented while the boycott lasted would have had precisely the same anticompetitive consequences during that period even if no

---

4. The Petition itself suggests that misrepresentations sufficient to abrogate *Noerr-Pennington* immunity must amount to a bar to meaningful access to the courts or administrative agencies, make the proceeding a sham, be material, threaten the fair and impartial functioning of the agencies, and/or deprive the proceeding of legitimacy. (Petition for a Writ of Certiorari ("Petition") at 8-10). That legal standard — not that *any* alleged misrepresentation defeats immunity — has been applied by the Third Circuit in this case and is reflected in the cases Petitioner cites for a conflict. *See infra* Part II at p. 11 n.5, Part III at pp. 15-20.

> legislation has been enacted. In *Noerr*, the desired legislation would have created the restraint on the truckers' competition; in this case the emergency legislative response to the boycott put an end to the restraint.

493 U.S. at 424-25.

This case is readily distinguishable from *Trial Lawyers*. There is no allegation here that Respondents petitioned the Department and the State Board for any purpose other than obtaining favorable government action. (App. 8a). Although Respondents participated in the CON process in order to oppose Petitioner's CON application, the fact remains that the sole antitrust injury claimed by Petitioner was caused directly by government action. (App. 11a-12a, 58a, 87a; Compl. ¶¶56-60). As the District Court stated:

> [Petitioner's] reliance on *Trial Lawyers Association* also is unavailing. [Respondents] did not refuse to perform surgeries until the federal Medicare rates were increased; defendants did not refuse to make their services available until the state bureaucracy acceded to some economic demand. The [Physician Respondents] merely posited into the state adjudicatory process for consideration a statement of future intent; the Hospital merely posited evidence supporting the proposition that it was prepared to meet the future out-patient surgery demands of the region as they arose. [Respondents] cannot control the states' subsequent decisions in coordinating and managing effectively the region's surgical market.

(App. 83a). Under *Trial Lawyers*, "where the sole antitrust injury is caused directly by the government action that the private defendant has helped to secure," *Noerr-Pennington* immunity applies. (App. 10a, 80a). *Accord Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988). (App. 70a-71a).

II. WHERE THE DAMAGES ALLEGED ARE CAUSED SOLELY BY STATE ACTION, THE FACT THAT PROTECTED *NOERR-PENNINGTON* PETITIONING ACTIVITY PLAYED A ROLE IN THE STATE PROCESS DOES NOT CREATE ANTITRUST LIABILITY.

Petitioner's discussion of State Action immunity is predicated on a critical misunderstanding of the Third Circuit opinion.[5] The petitioning immunity recognized in *Noerr-Pennington* and the State Action immunity recognized in *Parker v. Brown*, 317 U.S. 341 (1943), complement each other; they are "two faces of the same coin." (App. 7a, 16a). *See Eastern R.R. Presidents Conference v. Noerr Motor*

5. Petitioner is not correct in its contention that the Third Circuit's decision conflicts with the State Action decisions of this Court in *F.T.C. v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992), *Patrick v. Burget*, 486 U.S. 94 (1988), and *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), and with the Fourth Circuit's decision in *North Carolina ex rel. Edminston v. P.I.A. Asheville, Inc.*, 740 F.2d 274 (4th Cir. 1984), *cert. denied*, 471 U.S. 1003 (1984). (Petition at 3, 16) The Third Circuit did not hold that Respondents' alleged activities were immune under the State Action doctrine at issue in each of these cases. Rather, the Third Circuit held that, because all of Petitioner's alleged injuries were *caused* by governmental action (denial of the CON), Respondents could not be liable for those injuries as a matter of law. (App. 11a-12a).

Freight, Inc., 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Parker*, 317 U.S. 341 (1943). Respondents' opposition to Petitioner's CON application is classic petitioning activity protected by *Noerr-Pennington* and expressly authorized by the Pennsylvania CON Act. Furthermore, Respondents' opposition was consistent with the State's strong, statutorily expressed interest in protecting and maintaining the viability of rural health care providers which have historically served the medically underserved. *See* 35 Pa. Stat. Ann. § 448.707(b)(4).[6]

The Pennsylvania CON Act, by its very nature, was a restraint on competition. (App. 17a, 100a). Pennsylvania law expressly protected the continued viability of existing health care services, proscribing the granting of a CON which "adversely impacts the maintenance and development of rural and inner-city health services generally and, in particular, those services provided by health care providers which are based in rural and inner-city locations and which have an established history of providing services to medically underserved populations." 35 Pa. Stat. Ann. § 448.707(b)(4). Thus the State clearly articulated a legislative policy inviting and protecting the activities which Petitioner alleges are anticompetitive. (App. 17a, 100a). Public notice of consideration of applications for CON were required and "interested persons" were expressly empowered by statute to participate in the CON process.

Indeed, the Health Care Facilities Act mandated that the Pennsylvania Department of Health and State Board consider

6. As noted in footnote 1, the Pennsylvania CON Act sunset late in 1996, and has been replaced in part. *See* 28 Pa. Bull. No. 23 at p. 2643 (June 6, 1998).

the impact that granting a CON would have upon hospitals. The Board made a specific finding of fact on the very "anticompetitive" issue Petitioner is pursuing here, and on the deficiency of Petitioner's own application for a CON. State Board Finding of Fact No. 47 concluded: "The possibility that the proposed facility would have a negative impact on the Hospital was not adequately addressed in [Petitioner's] CON application." (App. 109a). The Department of Health and the State Board actively regulated the process as well. *See, e.g.*, 35 Pa. Stat. Ann. §§ 448.502, 448.505, 448.506 and 448.603.

Clearly, the CON Act was designed to determine appropriate levels of health care services, taking into account concern for the impact upon the entire health care system. *See, e.g.*, 35 Pa. Stat. Ann. §§ 448.202, 448.603(a)(1), (2), 448.707. The Health Care Facilities Act required the Department of Health and the State Board to consider carefully a number of factors from a variety of sources, including information from competitors and other financially interested parties. Toward that end, the Health Care Facilities Act vested in the State Board the power and duty "[t]o hear appeals by the applicant or *interested persons* from departmental decisions on applications for certificates of need." 35 Pa. Stat. Ann. § 448.502(a)(1) (emphasis added).

> "Interested person(s)" [include] "any health care provider providing similar services in the area to be served by the applicant or who has received a certificate of need to provide services in the area to be served by the applicant. . . ."

35 Pa. Stat. Ann. § 448.103. Moreover, the parties presenting testimony and information are governed by rules of conduct.

See 37 Pa. Code §§ 197.1, *et seq.* To accept Petitioner's argument that the Hospital and the Physician Respondents violated the Sherman Act when they petitioned the Department and the State Board would contravene the express language and intent of Pennsylvania's CON Act and abrogate the State's prerogative to regulate the delivery of health care.

It is beyond dispute that the Pennsylvania General Assembly specifically granted to the Department and the State Board the ability to review CON applications and determinations respectively. *See* 35 Pa. Stat. Ann. §§ 448.701, *et seq.* The Pennsylvania legislature established a clear right to petition for public meetings or hearings and input, including the objections of competitors who may oppose the project. *See* 35 Pa. Stat. Ann. §§ 448.704(b), 448.103; *Overlook Medical Clinic v. Department of Health*, 560 A.2d 268, 270 (Pa. Commw. Ct. 1989), *on reconsideration*, 565 A.2d 834 (Pa. Commw. Ct. 1989). It is thus both foreseeable, and explicitly authorized, for interested persons to oppose the granting of a CON. *Id.* Indeed, Petitioner conceded the existence of an "extensive review" process under Pennsylvania's CON Act. (Compl. ¶10).

The State administrative CON process reflects action by the State. The Third Circuit correctly held, as have other Courts of Appeals, that where all of Petitioner's claimed damages resulted from governmental action — are the product of State action — Respondents are not liable for those damages. (App. 10a-11a, 77a-80a). *See Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n*, 107 F.3d 1026 (3d Cir. 1997) (affirming dismissal pursuant to Rule 12(b)(6) on grounds that anticompetitive injury alleged

was direct result of governmental action), *cert. denied*, 522 U.S. 907 (1997); *Sandy River Nursing Care v. Aetna Cas.*, 985 F.2d 1138 (1st Cir. 1993), *cert. denied*, 510 U.S. 818 (1993); *Lawline v. American Bar Ass'n*, 956 F.2d 1378, 1383 (7th Cir. 1992); *Juster Assoc. v. City of Rutland*, 901 F.2d 266 (2d Cir. 1990). This is in essence a causation argument, and the Third Circuit's analysis of the cause of Petitioner's alleged injuries is consistent with these cases, and with *Trial Lawyers* and *Allied Tube*. (App. 7a-12a).

III. THE DECISION OF THE THIRD CIRCUIT DOES NOT CONFLICT WITH THIS COURT'S PRECEDENT OR THE APPLICABLE LEGAL STANDARD RECOGNIZED BY OTHER COURTS OF APPEALS, AND DOES NOT WARRANT THE GRANT OF CERTIORARI.

There is no substantive legal conflict between the Third Circuit's decision in this case and the applicable legal standard recognized by this Court and other Courts of Appeals regarding *Noerr-Pennington*. Petitioner, however, claims conflict with *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993), *City of Columbia v. Omni Outdoor Adver. Inc.*, 499 U.S. 365 (1991), *Allied Tube*, 486 U.S. 492, *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), *Potters*, 800 F.2d 568, *St. Joseph's Hosp., Inc. v. Hospital Corp. of Am.*, 795 F.2d 948 (11th Cir. 1986), and *Kottle v. Northwest Kidney Ctrs.*, 146 F.3d 1056 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 1031 (1999). (Petition at 3, 7-10). To the contrary, the Third Circuit correctly applied the legal principles articulated in these cases to the undisputed facts of this case.

In *California Motor Transport*, a case where the defendants had allegedly conspired to initiate repetitive and

baseless state and federal proceedings against the plaintiffs, this Court extended *Noerr-Pennington* immunity to judicial and administrative agency proceedings. *See California Motor Transport*, 404 U.S. at 510-16. In so extending *Noerr-Pennington*, the Court also defined a very narrow exception for the sort of baseless, repetitive claims that effectively deny a party meaningful access to administrative agencies and courts and amount to "sham litigation." As this Court explained:

> There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations. Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process. Opponents before agencies or courts often think poorly of the other's tactics, motions, or defenses and may readily call them baseless. One claim, which a court or agency may think baseless, may go unnoticed; *but a pattern of baseless, repetetive claims may emerge* which leads the factfinder to conclude that the administrative and judicial processes have *been abused*. That may be a difficult line to discern and draw. But once it is drawn, the case is established that abuse of those processes produced an illegal result, viz., *effectively barring respondents from access to the agencies and courts*. Insofar as the administrative or judicial processes are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of "political expression."

Id. at 513 (emphasis added).

Petitioner takes the second sentence in this paragraph from *California Motor Transport* out of context to argue that *any* alleged misrepresentation in adjudicatory proceedings vitiates *Noerr-Pennington* immunity. (App. 8a-10a). However, neither the holding in that case nor the paragraph, read in its entirety, supports that interpretation. Petitioner itself suggests that the alleged misrepresentation must be material, threaten the fair and impartial functioning of the state process, and render the proceeding a "sham." (Petition at 8-10). Furthermore, this Court in *Omni* carefully limited the *California Motor Transport* holding to its facts and rejected the invitation to carve out an additional exception ("conspiracy") to *Noerr-Pennington*. 499 U.S. at 381-82.

Nor does the Third Circuit's decision in this case conflict with this Court's reference to misrepresentations in *PRE*. (App. 9a, 74a-75a). By holding open the *possibility* that *Noerr-Pennington* immunity *might* be unavailable in circumstances involving misrepresentation, the Court seemed to suggest that it could contemplate situations where fraud or misrepresentation could be significant enough to render the litigation a "sham." As discussed previously, and as implicitly admitted by Petitioner, it is the latter standard that is consistent throughout the cases cited by Petitioner and the Third Circuit opinion in this case. [7]

---

7. Petitioner also contends that the Third Circuit's decision conflicts with *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 173 (1999), *Whelan v. Abell*, 48 F.3d 1247 (D.C. Cir. 1995), *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240 (9th Cir. 1982), and *Israel v. Baxter Lab., Inc.*, 466 F.2d 272 (D.C. Cir. 1972). (Petition at 9-10) Petitioner is not correct. Each of these cases applies the same

(Cont'd)

The Third Circuit's decision, therefore, correctly stated the applicable legal standard, consistent with the decisions of this Court, and as recognized by other Courts of Appeals.

(Cont'd)
legal standard applied by this Court in *California Motor Transport*, *Omni* and *PRE*, and by the Third Circuit in this case. Contrary to Petitioner's assertion, there is no conflict with *Cheminor* because, as the Third Circuit recognized, Petitioner has not alleged that Respondents petitioned the Department or the State Board for any purpose other than obtaining favorable governmental action. (App. 8a-9a n.2). While the Third Circuit acknowledged that *Omni* cast doubt as to the existence of a misrepresentation exception to *Noerr-Pennington* immunity, the Third Circuit nevertheless left open the possibility of an exception based on material misrepresentations. (App. 12a, 73a-74a). The Third Circuit then applied the correct legal standard to the pleaded facts in this case and determined, as the District Court also had determined, that *Noerr-Pennington* immunity applied for two primary reasons. First, the Pennsylvania Department of Health exercised its statutory authority "to regulate the number, size, and spacing of healthcare facilities" after its own investigation and a full hearing in which all interested parties had the opportunity to tender evidence and argument, with further review by the State Board and the Commonwealth Court. (App. 17a-18a, 90a-93a, 102a-117a). Second, the alleged misrepresentation with respect to the status of the Hospital's outpatient surgery center was raised to the Department and the State Board as part of the State adjudicatory process. (App. 18a, 106a, 113a at n.9). Thus, either this issue was not material to the Department or the State Board, or "to the extent this issue was material, the record reflects that the decision makers recognized that there was a dispute and made a credibility determination concerning it." (App. 18a, 103a-113a). Further, Petitioner admitted in its Complaint that even if the Hospital's center were completed, it would not have increased the number of operating rooms in Armstrong County, and the State's decision to deny the CON was based on its determination that Petitioner's proposed surgery center would needlessly duplicate *existing facilities* — not future facilities. (App. 5a, 18a, 65a, 91a, 106a, 111a, 113a).

All understood that *Noerr-Pennington* immunity is necessarily broad, with one narrow exception for those activities that render an adjudicatory proceeding a "sham."

The Courts in *Potters*, *St. Joseph's* and *Kottle* also recognized and applied this legal standard. *Potters*, decided before both *Omni* and *PRE*, held that "the knowing and willful submission of false facts to a government agency falls within the sham exception to the *Noerr-Pennington* doctrine." 800 F.2d at 580 (citations omitted). The claim in *Potters* was that the hospital's CON application contained "materially false statements." *Id.* at 580. The focus was on "knowing falsity," and the existence of an issue of fact as to whether the hospital had knowingly misrepresented facts, linking only knowing falsehoods to an abuse of the government process — or the sham exception. Subsequently, this Court in *PRE* set out the two prong approach to analyzing the sham exception, and subjective intent — or the "knowing" concept which was the focus in *Potters* — is not relevant until the objective prong is satisfied. (App. 8a-9a, 74a-75a).

St. Joseph's is even older and obviously did not have the benefit of *Omni*, *PRE* or any *Noerr-Pennington* precedent since 1986. Further, *McGuire Oil Co. v. Mapco, Inc.*, 958 F.2d 1552 (11th Cir. 1992), a later Eleventh Circuit *Noerr-Pennington* opinion addressing the sham exception (although decided prior to this Court's decision in *PRE*), supports the integrity of *Noerr-Pennington* immunity. The *McGuire* Court held that where there was no indication that plaintiffs commenced litigation that they did not intend to win "or that their goal was anything but a favorable decision from the courts," their conduct was immune from antitrust liability under *Noerr-Pennington*, even if the litigation may have been

undertaken with an anticompetitive purpose. *Id.* at 1560. Similarly, as the Third Circuit correctly recognized in this case, there is no allegation that Respondents opposed Petitioner's CON application "for any purpose other than obtaining favorable government action." (App. 8a).

In *Kottle*, 146 F.3d 1056, the Ninth Circuit affirmed dismissal of the antitrust action against a competitor, following the State's denial of Kottle's CON application, finding that the CON opposition by the competitor center was protected by *Noerr-Pennington*. The Court in *Kottle* analyzed the sham exception, with allegations of "numerous intentional misrepresentations to the Department." *Id.* at 1062. The Court declined to sweep away *Noerr-Pennington* immunity, which it described as "a direct application of the Petition Clause," *id.* at 1059, unless Northwest Kidney "so misrepresented the truth to the Department that the entire CON proceeding was deprived of its legitimacy." *Id.* at 1063. Based on the undisputed facts of the case at bar, the *Kottle* Court would reach the same result as the Third Circuit. Here, the alleged misrepresentation was raised in the State process, and the State resolved it. Accordingly it was either not material or a credibility determination was made — and the legitimacy of the State adjudicatory process remained intact.

An examination of the decision of the Third Circuit in this case reveals that it correctly applied the precedents of this Court, and is not in conflict with the decisions of other Courts of Appeals, in determining that Respondents' petitioning conduct was entitled to *Noerr-Pennington* immunity, and, as a separate basis for affirming dismissal, in determining that Respondents' alleged conduct was not the proximate cause of Petitioner's claimed injuries.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

MICHAEL J. MANZO
Counsel of Record
KLETT, LIEBER, ROONEY
& SCHORLING, P.C.
Attorneys for Respondent
Armstrong County
Memorial Hospital
One Oxford Centre
301 Grant Street, 40th Floor
Pittsburgh, PA 15219
(412) 392-2018

WENDELYNNE J. NEWTON
Counsel of Record
SHEILA SMITH DiNARDO
BUCHANAN INGERSOLL
PROFESSIONAL CORPORATION
Attorneys for Respondent
Physicians
One Oxford Centre
301 Grant Street, 20th Floor
Pittsburgh, PA 15219
(412) 562-8932

APPENDIX

APPENDIX — COMPLAINT DATED JULY 23, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 961384

ARMSTRONG SURGICAL CENTER, INC.,

Plaintiff,

v.

ARMSTRONG COUNTY MEMORIAL HOSPITAL; ROGELIO BORJA; RICHARD BOSCO; ZAFAR CHOWDHRY; JEFFREY DAVID; FRANK DAVIE; EGBERT deVRIES; PAUL L. FREDERICK; JOHN GARROTT; FRANK N. GENOVESE; IRVING KLEIN; DAVID H. KOHL; LEE H. KOSTER; JOHN MARTY; MICHAEL P. ONDICH; KARL R. SALTRICK; WILLIS SHOOK; ANTHONY SMALDINO; PETER SOTOS; JAE T. YANG.

Defendants.

COMPLAINT

Jurisdiction and Parties

1. Plaintiff, Armstrong Surgical Center, Inc., a Pennsylvania corporation with its principal place of business in Pittsburgh, Pennsylvania, brings this civil action against Defendants under Sections 1 and 2 of the Sherman Act (15 USC §§1,2) and under 15 USC §15 for treble damages

as a result of violations by Defendants of the antitrust laws of the United States.

2. Plaintiff demands a jury trial of this cause.

3. Defendant Armstrong County Memorial Hospital (Hospital), a Pennsylvania non-profit corporation, operates a general hospital in Kittanning, Armstrong County, Pennsylvania.

4. The individual Defendants listed below are licensed physicians or other practitioners on the medical staff of the Hospital and perform surgery (inpatient and/or outpatient) at the Hospital:

Rogelio Borja, M.D.
Richard Bosco, D.M.D.
Zafar Chowdhry, M.D.
Jeffrey David, M.D.
Frank Davie M.D.
Egbert deVries, M.D.
Paul L. Frederick, M.D.
John Garrott, M.D.
Frank N. Genovese, M.D.
Irving Klein, M.D.
David H. Kohl, M.D.
Lee H. Koster, M.D.
John Marty, D.P.M.
Michael P. Ondich, D.O.
Karl R. Saltrick, D.P.M.
Willis Shook, M.D.
Anthony Smaldino, D.P.M.
Peter Sotos, M.D.
Jae T. Yang, M.D.

5. Each of the Defendants transacts business and maintains an office and is resident within this District and Division. The Court has juri diction of this proceeding under 15 USC §15.

6. The Hospital and each of the individual Defendants purchase significant amounts of equipment and supplies which move in interstate commerce and are paid for the services they provide in substantial part by entities engaged in interstate commerce and by the United States of America or agencies thereof. Plaintiff, if permitted to operate, would purchase significant amounts of equipment and supplies which move in interstate commerce and would be paid for the services it provides in substantial part by entities engaged in interstate commerce and by the United States of America or agencies thereof.

Definitions

7. As used in this Complaint, the following words or phrases shall have the following meaning:

ASC is a freestanding ambulatory surgery center in which only outpatient surgery is performed.

Board is the Commonwealth of Pennsylvania State Health Facility Hearing Board.

CON is the Certificate of Need required under the State Act to establish an ASC.

Department is the Department of Health of the Commonwealth of Pennsylvania.

Hospital ASC is the Hospital facility described in Paragraph 19 of this Complaint.

Appendix

Inpatient Surgical Services are surgical services provided for a patient who requires overnight hospitalization.

Mixed Use ORs are operating rooms in which both inpatient and outpatient surgery are performed.

OR or ORs are operating room(s) in a hospital or an ASC.

Outpatient Surgical Services are surgical services provided for a patient who does not require overnight hospitalization.

Patient is the person(s) and entity(s) which actually pay the provider for surgical service provided to a patient.

Plaintiff ASC is the freestanding ASC which Plaintiff proposed to establish.

Physicians Group are the individual Defendants identified in Paragraph 4 of the Complaint.

Price is the amount actually paid by the Patient for surgical services.

State Act is the Pennsylvania Health Facilities Act (35 P.S. §448.101 *et seq.*).

State Health Plan is the plan prepared under the State Act which applied to Plaintiff's CON application.

Appendix

Plaintiff's Attempt to Establish An Ambulatory Surgery Center in Kittanning, Pennsylvania

8. On March 11, 1991, Plaintiff filed with the Department an application for the CON required under the State Act to establish the Plaintiff ASC in Kittanning, Armstrong County, Pennsylvania. The Plaintiff ASC would have two (2) operating rooms, a special procedures room and a dental room, and would offer Outpatient Surgical Services in various specialties including ENT, gastroenterology, general surgery, gynecology, ophthalmology, orthopedics, and urology.

9. ASCs not owned by a hospital typically provide Outpatient Surgical Services at a lower Price to the Patient than a hospital Price for the same or equivalent Outpatient Surgical Services.

10. Following the filing of Plaintiff's CON application, the Department engaged in an extensive review process which included gathering information by investigation, submissions and at a public hearing held on October 7, 1993 (Hearing).

11. Section 202 of the State Act (35 P.S. §448.202) requires, inter alia, the Department in its planning and review activities to foster competition to promote cost efficiency, quality and access to care.

12. The Hospital, which has the only ORs in Armstrong County, vigorously opposed the grant of the CON for the Plaintiff ASC through the entire course of the Department review.

Appendix

13. On May 21, 1991 (two months after Plaintiff filed its CON application) the Hospital which then had only 5 Mixed Use ORs requested permission from the Department to add an additional OR which was subsequently granted. At the time of the Hearing the Hospital had 6 Mixed Use ORs.

14. The Plaintiff ASC met all requirements of Section 707(a) of the State Act (35 P.S. §448.707(a)) and the criteria of Chapter 29 of the State Health Plan necessary for approval of the CON for the Plaintiff ASC.

15. On November 17, 1993, the Department of Health Planner recommended disapproval of Plaintiff's CON application and on November 29, 1993 the Department officially disapproved issuance of the CON.

16. Plaintiff appealed to the Board which, after Board hearings at which additional evidence was presented, on March 13, 1996 affirmed the Department decision denying issuance of the CON and dismissed Plaintiff's appeal.

17. In its Opinion, Findings of Fact, and Conclusions of Law, the Board held that, although the Plaintiff had met the requirements of the State Act and had met the criteria of Chapter 29 of the State Health Plan, the merits required denial of the CON application on two inter-related grounds:

(1) A partially completed Hospital ASC made the Plaintiff ASC unnecessarily duplicative and, therefore, unneeded; and

(2) The Plaintiff ASC would not be economically viable because the Physicians Group which performed 90% of all surgery performed in Armstrong County would only use the Hospital ASC and would not use the Plaintiff ASC.

18. The two grounds for denial of the CON for the Plaintiff ASC were the product of (i) an unlawful agreement, combination, and conspiracy of Defendants which violated Sections 1 and 2 of the Sherman Act and (ii) misrepresentation of material facts to the Department by the Defendants as set forth hereafter in this Complaint.

Agreement, Combination and Conspiracy Violating Sections 1 and 2 of the Sherman Act

19. In response to Plaintiff's CON application, sometime after August 31, 1992, the Hospital, with Department authorization, began construction of a building attached to the Hospital to which Hospital represented it would move 3 of its current 6 ORs for exclusive use for ambulatory surgery (Hospital ASC). The proposed Hospital ASC would not increase the total number of ORs in Armstrong County, but would simply transfer 3 existing Mixed Use ORs to the new building for ASC use and leave 3 ORs for Hospital inpatient surgery.

20. Prior to June 17, 1993, after the shell of the building had been erected, construction of the Hospital ASC stopped and has never been resumed. Extensive and expensive additional construction and installation work would be required to complete the Hospital ASC for use.

Appendix

21. At the Board Hearing, by separate identical (except for one with a handwritten addition) letters, in the form attached as Exhibit "A", all dated October 4, 1993 and prepared by the Hospital on Hospital stationary, by which each member of the Physicians Group advised the Department:

(1) He would not use the Plaintiff ASC;

(2) He would use the "Ambulatory Surgery Center at Armstrong County Memorial hospital";

(3) "The hospital's Ambulatory Surgery Center provides the highest quality medical care at the most reasonable cost"; and

(4) Recommended that the CON not be granted for the Plaintiff ASC because:

(i) it was not necessary;

(ii) it duplicates services already being provided; and

(iii) is not cost effective.

22. At all relevant times, the Physicians Group performed a very high percentage of all surgery (inpatient and outpatient) at the Hospital and, thus, in Armstrong County. The Board found that the Physicians Group performed 90% of all such surgery. In the year ended June 30, 1993, the Physicians

Group performed over 73% of all outpatient surgery, over 69% by nine of the individual Defendants.

23. To limit severely the opportunity for Plaintiff to respond before the Department took action, the Physicians Group letters were delivered to the Department at the Hearing without prior notice to Plaintiff.

24. The clear intent and purpose of the Physicians Group letters was to establish (1) that there was in fact a Hospital ASC readily available for use which would provide the same Outpatient Surgical Services as would the Plaintiff ASC; (2) to establish that the Plaintiff ASC would not be economically viable because the Physicians Group who collectively perform 90% of all surgery and over 76% of outpatient surgery in Armstrong County would not use the Plaintiff ASC; and (3) to provide the Department with a basis for denying issuance of the CON needed for the Plaintiff ASC.

25. The letters from the Physicians Group were written in furtherance of the agreement, combination and conspiracy of all Defendants for the purpose of (i) preventing competition in providing Outpatient Surgical Services in Armstrong County and (ii) preventing or limiting competition in providing medical services for outpatient surgery in Armstrong County.

26. At all relevant times the interest of the Hospital was solely to preserve the status quo by preventing competition with the Hospital in supplying Outpatient Surgical Services in Armstrong County, not to complete the Hospital ASC.

Appendix

27. The Hospital economic interest was, at all relevant times, to maximize its revenue, not reduce it. In 1992 the Hospital secured a change in its status for Medicare reimbursement (Price) for the sole purpose of increasing Medicare reimbursement (Price) by approximately $1,500,000 in the year ending September 30, 1993.

28. Completion of the Hospital ASC, absent competition by the Plaintiff ASC, was not in the economic interest of the Hospital because Hospital revenue would not be increased by the further investment required to complete the Hospital ASC. The Price for Outpatient Surgical Services would remain essentially the same if the Hospital, upon completion, chose to maintain the Mixed Use OR Price option for Medicare patients or would decrease significantly if the Hospital then chose the ASC Price option for Medicare patients.

29. In the absence of local competition, the Hospital would not lower the Medicare reimbursement (Price) and Hospital revenue even if it completed and used the Hospital ASC.

30. At all relevant times, the economic interest of the Physicians Group was to prevent establishment of the Plaintiff ASC to preserve the status quo in which they controlled and monopolized the scheduling and availability of Hospital OR time and, thereby, of all surgery performed in Armstrong County. The Plaintiff ASC would provide an alternative facility at which numerous other readily available physicians and practitioners, whether on the medical staff of the Hospital or not, could perform outpatient surgery in

Armstrong County at a significantly lower Price for Outpatient Surgical Services.

31. The intended results of Defendants' agreement, combination and conspiracy were accomplished because they became controlling factors in the Department and Board denial of the CON for the Plaintiff ASC. Such denial preserved the non-competitive status quo for the benefit of the Hospital and the Physician Group, individually and collectively, by preventing or reducing potential competition in Armstrong County to the Physicians Group in providing medical services for outpatient surgery and to the Hospital in providing Outpatient Surgical Services.

32. The prevention or reduction of competition by Defendants' agreement, combination or conspiracy restrained trade among the states and was an attempt to monopolize a part of the trade or commerce among the several states in violation of §§1 and 2 of the Sherman Act.

33. Defendants' agreement, combination and conspiracy are a *per se* violation of §§1 and 2 of the Sherman Act.

Defendants' Misrepresentations to Induce Action by the Department

34. In furtherance of the agreement, combination and conspiracy, the Defendants intentionally misrepresented to the Department material facts relating to the Hospital ASC to induce disapproval of the CON for the Plaintiff ASC, as set forth hereafter.

35. In October and November 1993, the Hospital provided the Department, by testimony at the Hearing and by submissions, extensive information concerning the Hospital ASC without ever advising the Department that construction had been stopped before mid June 1993 and had not been resumed. The information supplied by the Hospital to the Department at that time was that the Hospital ASC was either available for use or would be available for use shortly.

36. The Physicians Group letters of October 4, 1993, stated:

(a) "The hospital's Ambulatory Surgery Center *provides* [emphasis added] the highest quality medical care at the most reasonable cost." when in fact it did not exist then and would never exist.

(b) The Plaintiff ASC "duplicates services *already being provided* [emphasis added], and it is not cost effective", when, in fact, the Hospital ASC did not exist and the Hospital Prices for Outpatient Surgical Services provided in its Mixed Use ORs were substantially higher than the Prices which would be charged at the Plaintiff ASC.

37. When the October 4, 1993 letters were given to the Department the Hospital and all, or substantially all, of the Physicians Group knew that construction on the Hospital ASC had stopped by early June 1993 with only the shell of

the building completed; that construction had not been resumed; that there was no Hospital plan or commitment to resume construction; and that the Hospital had no intention to complete construction of the Hospital ASC if the CON for the Plaintiff ASC was not granted by the Department.

Market, Restraint of Trade Monopolization and Injury to Competition

38. Because the actions of the Defendants constitute *per se* violations of §§1 and 2 of the Sherman Act, restraint of trade or commerce among the several States monopolization or attempt to monopolize a part of the trade or commerce among the several States, and injury to competition are established. Paragraphs 29 through 54 amplify the illegal *per se* violations.

39. In evaluating the CON application for Plaintiff's ASC, the Department determined that Armstrong County constituted the appropriate service area in which to measure the need for an ASC. Kittanning, where the Hospital is located and where the Plaintiff ASC would be located, is near the geographical center of Armstrong County. Armstrong County is an appropriate market area to measure the effects of Defendants actions.

40. Armstrong County has a high population of elderly people and a low average household income. The immediately surrounding portions of Butler, Clarion, Indiana and Westmoreland Counties have similar demographic characteristics.

Appendix

41. Approximately sixty-three percent (63%) of all surgery performed in Armstrong County is on Medicare patients.

42. In Armstrong County there are only the 6 Mixed Use ORs at the Hospital and no ASC OR.

43. There is no ASC OR in Butler County which adjoins Armstrong County to the West, in Clarion County which adjoins it to the North, or in Indiana County which adjoins it to the East.

44. The closest ASC ORs in Westmoreland County (in Ligonier and Jeannette), which adjoins Armstrong County to the South, are approximately 50 miles from Kittanning by secondary roads.

45. The closest freestanding outpatient ORs in Allegheny County (in Monroeville and Cranberry Township) are approximately 40 miles from Kittanning by secondary roads. Others are at a greater distance.

46. Despite the tremendous and continuing growth of outpatient surgery in all parts of the United States, driven by improved surgical procedures, new medical equipment, cost pressures and patient convenience, fewer outpatient surgery procedures were performed in Armstrong County (all at the Hospital) in 1993 (4,214) than in 1986 (4,312), 1988 (4,549), 1989 (4,416), 1990 (4,549), 1991 (4,497), or 1992 (4,368).

47. Outpatient surgery at the Hospital was limited by the over utilization of its current 6 ORs and by the demands of inpatient surgery.

Appendix

48. For outpatient surgery, the residents of Armstrong County must either (1) use the Hospital and pay its high Prices; (2) travel a long distance to find a lower Price ASC, with all the costs and inconveniences of location, time, travel, possible use of unfamiliar physicians, etc.; or (3) put off the surgery if it is elective.

Financial Injury to Outpatient Surgery Patients in Armstrong County

49. The Price of Outpatient Surgical Services provided in the Hospital ORs was, on average, substantially higher than the Price for equivalent Outpatient Surgical Services provided in an ASC such as the proposed Plaintiff ASC.

50. Medicare reimbursement (i.e., Price) for surgical services provided by health care providers is established by the Health Care Finance Administration of the Department of Health and Human Services, of the United States. The Medicare Price for surgical services provided at an ASC is significantly less than the Medicare Price for the equivalent surgical services performed in hospital Mixed Use ORs or in a hospital-owned ASC which elects to charge the Mixed Use Price.

51. Third party payors (Blue Cross, Insurance Companies, etc.) frequently track Medicare Prices in establishing the Prices which they will pay for Outpatient Surgical Services, and the Prices which they pay are significantly lower when performed at an ASC than if performed at a hospital.

Appendix

52. Medicare pays only 80% of the Medicare Price and the Patient (excluding Medicare) is responsible for the balance. Because of the manner in which the 20% Patient co-payment is calculated, such co-payments are on average significantly higher than 20% of the Medicare Price.

53. At the time of the Department Hearing, the average Price for Outpatient Surgical Services provided by the Hospital ORs was approximately $400 higher per procedure than the Price which would have been paid at the Plaintiff ASC, or at a similar non-hospital ASC. The average Medicare 20% co-payment Price was approximately $455 higher per procedure at the Hospital than it would have been in the Plaintiff ASC or in a similar non-hospital ASC. Because the average Price of Outpatient Surgical Services used in the comparison was less than $800 at the ASC, the savings for a Medicare Patient would have been in total over 50% of the Hospital Price and for a non-Medicare Patient around one-third of the Hospital Price.

54. Based on the number of outpatient surgeries performed in Armstrong County (at the Hospital) in the year ended June 30, 1993 (4,214), the Price saving from using a local ASC could reach more than $2,800,000 yearly.

55. Defendants' illegal restraints of trade or commerce and monopolization prevented any Patient saving whatsoever for Outpatient Surgical Services performed in Armstrong County.

Appendix

Plaintiff's Injury and Damages

56. As a direct and proximate result of the illegal conduct of the Defendants as set forth herein Plaintiff was injured in its business in various ways, including, but not limited to:

(1) Denial of the CON required to establish and operate Plaintiff's ASC in Kittanning, Pennsylvania.

(2) Denial of Plaintiff's ability to establish and operate its ASC.

(3) Delay in securing the required CON, if ultimately granted, for the establishment and operation of the Plaintiff ASC.

(4) Increased costs, legal and otherwise, in pursuing Plaintiff's application for a CON.

(5) Complete loss of the value of the CON, or a reduction in its value when and if ultimately granted.

(6) Complete loss of the value of Plaintiff's ASC, or reduction of its value when and if permitted to be operated.

(7) Complete loss of, or reduction in, the income and cash flow which Plaintiff would have received from operation of the Plaintiff ASC.

(8) Other related losses.

Appendix

57. Plaintiff expected that, after a loss during the first year of operation, the Plaintiff ASC would have an operating profit (before interest and taxes) during the second year which would increase in the years thereafter, the loss of which damaged Plaintiff in an amount which Plaintiff will establish at trial.

58. Plaintiff expected that, after a negative cash flow from operation during the first year of operation, the Plaintiff ASC would have a cash flow from operations in the second year which would increase in the years thereafter, the loss of which damaged Plaintiff in an amount Plaintiff will establish at trial.

59. At trial Plaintiff will establish the damages to it from the loss of, or reduction in, the value of the CON for the Plaintiff ASC and the value of the business of the Plaintiff ASC.

60. At trial Plaintiff will establish the amount of other losses, expenses, costs and damages from the injuries set forth in Paragraph 56 and reasonable attorney's fees incurred by Plaintiff in connection with this action.

WHEREFORE, Plaintiff requests that:

1. Plaintiff be awarded a judgment against Defendants, jointly and severally, for all monetary damages it suffered, trebled as required by law

2. Plaintiff be awarded its costs herein, including a reasonable attorney's fee, as provided by law.

3. Such other relief as may be just and proper.

Dated: July 23, 1996

s/ John L. Laubach, Jr.
John L. Laubach, Jr., I.D. No. 1278
John P. Klee, I.D. No. 00356

LAUBACH, FULTON & DELANEY
2350 One PPG Place
Pittsburgh, PA 15222
(412) 263-6708

James G. Park, I.D. No. 1335
374 Midway Road
Pittsburgh, PA 15216
(412) 561-7388

Attorneys for Plaintiff

Appendix

EXHIBIT "A"

ACMH
Armstrong County Memorial Hospital
One Nolte Drive • Kittanning, PA 16201-8808 •
(412) 543-8500

October 4, 1993

ITEM NO. 31

Mr. Jack W. Means, Jr., Director
Division of Need Review
Pennsylvania Department of Health
Room 1023, Health and Welfare Building
P. O. Box 90
Harrisburg, PA 17108

Dear Mr. Means:

I wish to take this opportunity to indicate to you that I do not intend to perform surgery at the proposed Armstrong Surgical Center. I intend to use the services of the Ambulatory Surgery Center at Armstrong County Memorial Hospital. The hospital's Ambulatory Surgery Center provides the highest quality medical care at the most reasonable cost.

I recommend that you do not grant a Certificate of Need to the proposed Armstrong Surgical Center because it is

unnecessary. It duplicates services already being provided, and it is not cost effective.

Thank you for your consideration of my comments.

Sincerely,

s/ Frank N. Genovese, M.D.
Frank N. Genovese, M.D.
Member of the Medical Staff of
Armstrong County Memorial
Hospital